IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12937 of 2004

For Approval and Signature:
HONOURABLE MR.JUSTICE A.M.KAPADIA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

JAYDEVKUMAR CHANDRASHANKAR BHATT - Petitioner(s)

Versus

RAMNIKLAL MOHANLAL GANATRA - Respondent(s)

==========

Appearance :
MR ANSHIN H DESAI for Petitioner No(s).: 1.

RULE SERVED for Respondent No(s).: 1.
MR. G.RAMKRISHNAN for TANNA ASSOCIATES for Respondent No(s).: 1.

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 24/08/2005

ORAL JUDGMENT

1.By filing instant petition under Articles 226/227 of the Constitution of India, the petitioner seeks to challenge the order dated 23.2.2004 recorded below application exh.18 in Special Civil Suit No. 146 of 2002 by the learned Civil Judge (SD), Jamnagar, by which the application filed by the petitioner under

Order 8 Rule 1 of the Code of Civil Procedure ('the Code' for short), seeking permission to file the written statement came to be rejected.

2. The respondent herein has filed Special Civil Suit No. 146 of 2002 against the present petitioner seeking decree of specific performance of contract. Along with the suit the respondent has also moved application under Order 39 Rule 1 and 2 read with Section 115 of the of the Code praying for interim injunction.

3. The petitioner filed application on 2.9.2002 stating that sometime may be granted and the petitioner will not sell the land in question. On the basis of the aforesaid statement made by the petitioner, the trial Court directed to maintain status quo with regard to the property in question. Thereafter the trial Court framed issues at exh.11. The petitioner, thereafter, moved an application exh.18 inter alia stating that through inadvertent mistake and due to engagement in business, he could not file written statement in time and hence the stage of the written statement has been closed and therefore prayed to permit him to file written statement. The said application came to be rejected on the ground that in view of the statutory provisions contained under Order 8 Rule 1 of the Code, time to file written statement cannot be extended beyond the period of 90 days and accordingly the application has been rejected, which has given rise to the present petition.

4. This Court has considered the submissions advanced by Mr. Anshin H Desai, learned advocate of the petitioner and Mr. G.Ramakrishnan, learned advocate for the respondent and perused the impugned order as well as

the averments made in the petition.

5. So far as the factual matrix is concerned, there is no dispute that the written statement has been filed after a lapse of about 2 years and in the application exh.27 it was stated that through inadvertent mistake and because of engagement in the business he could not file the written statement in time. The learned trial Judge has rejected the application only on the ground that, in view of the provisions contained under Order 8 Rule 1 of the Code, he cannot accept the written statement as it is filed after the prescribed period of 90 days.

6. In the case of Kailash vs. Nanhku and others, (2005) 4 SCC 480, Supreme Court has held that Order 8 Rule 1 and the proviso thereto, as amended by Act 22 of 2002 (w.e.f. 1.7.2002) are directory in character and not mandatory. It was further held that though they cast an obligation on defendant to file a written statement within the time prescribed therein, the provisions do not deal with nor specifically take away the power of the court to take a written statement on record, though filed beyond the time as provided for therein. Supreme Court further elucidated the guidelines in this regard.

7. In view of the clear elucidation of the Supreme Court in above referred to judgement, there is no manner of doubt that Order 8 Rule 1 and the proviso thereto, as amended by Act 22 of 2002 (w.e.f. 1.7.2002) are directory in character and not mandatory, therefore, duty is cast upon the Court to exercise the power.

8. On having look on the impugned order, the learned trial Judge has stated in his order that the defendant cannot file written statement after a period of 90 days in view of the statutory provisions contained under the

Act. The learned trial Judge has not assigned the reason for not accepting the written statement except the statutory bar contained under Order 8 Rule 1 of the Code, which is now held directory by the Supreme Court in the case of Kailash (supra).

9. In aforesaid view of the matter, according to this Court, the learned trial Judge has committed error in law and also jurisdictional error in rejecting the application filed by the petitioner seeking permission to take on record the written statement. Therefore, the impugned order deserves to be quashed and set aside by allowing this petition.

10. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs, the result of which is that the order dated 23.2.2004 recorded below application exh.18 in Special Civil Suit No. 146 of 2002 by the learned Civil Judge (SD), Jamnagar is hereby quashed and set aside and the said application exh.18 is granted. The petitioner is permitted to file written statement within a period of 2 weeks from the date of receipt of the writ of this order by the trial Court. Rule is made absolute accordingly.

Direct service permitted.

(A.M.Kapadia,J)

Jayanti*